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No. 87-928

In The
Supreme Court of the United States
October Term, 1987

METZ BAKING COMPANY and BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433,
Petitioners,

vs.

SELMAN (JOE) THOMAS, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

For Respondents to vacate the arbitrator's Decision and Award in this case they must demonstrate that the arbitral award was "tainted" or "seriously undermined" by the Union's breach of its duty of fair representation. Absent such a "taint", the arbitral award must be enforced.

Respondents have advanced two claims alleging violation of the duty of fair representation. First, Respondents contend that the Union failed to negotiate once it learned of possible layoffs. Second, Respondents argue that the arbitrator was not given a collateral Sales Agreement and the Union's failure to present this Agreement at the arbitration violated its duty of fair representation.

Respondents now concede in their Brief in Opposition that the record does not establish a "taint" or an undermining of the arbitral process with respect to their claims concerning the failure to negotiate.

This concession demonstrates the frailty of the rationale for vacating the arbitral award. Respondents' only claim of "taint" or undermining of the arbitral process is that the Sales Agreement was not admitted into evidence at the arbitration. Yet this Court has recently said in *United Paper Workers International Union AFL-CIO v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987) (No. 86-651), that the courts have no business weighing the merits of disputes and thereby vacating an arbitral award if the arbitration award draws its essence from the collective bargaining agreements. 56 U.S.L.W. at 4014. In the present case the collective bargaining agreements

were before the arbitrator and his decision specifically relied upon them.

II.

Respondents also contend that ten "facts" discussed in Petitioners' Statement of the Case were taken from the arbitrator's decision and were not supported by the record of trial. (Respondents' Brief, pages 10-12)

The "facts" in question were indeed taken from the arbitrator's decision and were clearly cited accordingly. Petitioners have contended throughout that the arbitrator's decision should be reinstated. In particular, Petitioners have urged that one of the reasons the arbitrator's decision should be reinstated is that the parties agreed to place this dispute before an experienced arbitrator who has an understanding of the economic reality of labor relations disputes. As this Court recently stated in the *Misco* case, *supra*: "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, *it is the arbitrator's view of the facts* and of the meaning of the contract *that they have agreed to accept.* 56 U.S.L.W. at 4014 (emphasis supplied).

The first two "facts" cited by Respondents (that the IBC plant was operating at a loss which made its closure "probable" if not inevitable and that IBC therefore initiated negotiations for sale) were taken from the arbitrator's findings. The losses sustained by IBC prior to sale were evidenced by Exhibit 112 (statement of IBC income) which was introduced both at the arbitration and at the trial. These "facts" form part of the economic background of this dispute. Together with the remain-

ing eight "facts" discussed *infra*, they are material to a consideration of the merits of the arbitrator's decision and thus were properly included in Petitioners' Statement of the Case. Supreme Court Rule 21.1(g)

The remaining eight "facts" do appear in the Record of Proceedings as evidenced by their citation from the arbitrator's Decision and Award. However, these facts also appear in the decisions of the District Court and of the Eighth Circuit Court of Appeals and are clearly properly included in the Statement of the Case.[1]

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[1] Since the Court does not have the Record of Proceedings below, Petitioners have with few exceptions confined their citations to matters appearing in the decisions below. The remaining eight "facts" as stated by Respondents are hereafter quoted from pages 10-12 of Respondents' Brief. These "facts" are followed by supporting quotations from the opinions of the District Court or Eighth Circuit (as found in the Appendix to the Petition):

"3. Even if negotiations had been requested, Metz did not intend to sacrifice the interests of its work force over that of the former IBC employees." *See* District Court's opinion: "The evidence was insufficient for a jury to reasonably find that negotiations between Metz and the Union would have affected the layoffs. The only testimony on point indicated that Metz intended to keep its own employees on the job when it transferred the Nicholas Street operation to the Leavenworth Street facility . . . Metz had no reason or inclination to agree to handle the layoffs in any other way." (App. 36a-37a).

"4. Metz, in accordance with its past practice, was determined to treat the IBC workers as "new hires" and to "endtail" them at the bottom of the seniority list, thus protecting the existing Metz work force." *See* citation to District Court's opinion following "fact" 3, *supra*. *See also*, Eighth Circuit opinion at App. 15a-16a, wherein the Eighth Circuit in summarizing the testimony of Lessman at the arbitration wrote: "Metz's past practice had been to treat "acquired" employees just as it treated the former IBC workers as new hires, and Metz had no intention of changing that practice with the IBC transaction."

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"5. The Sales Agreement between IBC and Metz did not contain any provision for IBC workers to obtain seniority over Metz workers after the purchase." See District Court decision: "Such a conclusion finds further support in the undisputed evidence that the collective bargaining agreement did not contain any language regarding how to merge the Metz and IBC seniority lists. And the Sales Agreement, at most, obligated Metz to assume the IBC contract in full." (App. 46a) *See also,* Judge Henley's concurring and dissenting opinion in the Eighth Circuit where he wrote: "[I]t [the Sales Agreement] nowhere provides that the IBC employees would be dovetailed with the Metz employees or that they would not be endtailed. . ." (App. 25a)

"6. The collective bargaining agreement did not contain any provision for integration of employees in the event the two work forces were combined." *See* District Court's decision, "Arbitration was necessary to determine the proper interpretation of the seniority provisions since the [collective bargaining] contract was silent on the subject of assembling one work force from two bargaining units." (App. 34a) *See also* the District Court's opinion at App. 46a which referred to: "[T]he undisputed evidence that the collective bargaining agreement did not contain any language regarding how to merge the Metz and IBC seniority lists."

"7. None of the IBC employees requested that the Sales Agreement between IBC and Metz be produced or made a part of the record at the arbitration hearing." *See* District Court's opinion at App. 38a: "At no time during the [arbitration] hearing did the Union attorney restrict what any witness from either group said. None of the IBC witnesses testified at the arbitration hearing regarding the absence of or the need for production of the Sales Agreements at the hearing . . ."

"8. The collective bargaining agreement did not answer the question of whether workers should be "endtailed" or "dovetailed" once integration of the work forces occurred." *See* citations to the District Court's opinion following "fact" 6, *supra*.

"9. Metz was following its past practice and the practice of the industry in treating the IBC employees as 'new hires.'" *See* citation to the Eighth Circuit's opinion following "fact" 4, *supra*.

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III.

Respondents further argue that several of the cases cited by Petitioners with respect to conflict in the Circuits are not in point. Respondents' analysis fails to encompass all of the cases cited by Petitioners. *See, Self v. Drivers, Chauffeurs, Warehousemen, Etc.*, 620 F.2d 439 (4th Cir. 1980); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), *cert. denied*, 106 S. Ct. 3282 (1986); and *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981). Nor does it answer the legal argument made that the Eighth Circuit has adopted a new more relaxed standard as to what constitutes a violation of the duty of fair representation sufficient to vacate an arbitral award.

A careful reading of the cases supposedly distinguished by Respondents demonstrates they are on point and were properly cited. A case in point is the decision in *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 3232 (1987). Respondents' characterization that this is merely another failure to negotiate case is incorrect.

In the *Wood* case the District Court's denial of Defendant Kroger's motion for judgment as a matter of law was reversed by the Sixth Circuit Court because: "there was no evidence that any breach of the Union of its duty

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"10. The Union's attorney specifically argued to the arbitrator on behalf of the IBC workers that Metz had assumed the collecting bargaining agreement which the Union had with IBC." See District Court's opinion at App. 46a, note 2: "In its brief to the arbitrator, the Union did argue that Metz had assumed the collective bargaining agreement."

of fair representation tainted the arbitrator's decision." 807 F.2d at 500. Several of the alleged grounds for the Union's failure of its duty of fair representation stemmed from the Union's conduct at the arbitration—including the Union's objections to Plaintiffs' evidence and testimony as well as an alleged "signal" to the arbitrator that the Union did not desire to win the case. 807 F.2d at 500-502.

Both the *Wood* case and the recently decided *Misco* case discuss the importance of preserving the arbitrator's decision. Although Respondents have argued throughout that the Sales Agreement was not submitted to the arbitrator, the *Wood* case makes plain that: "A court may not review the merits of an arbitration decision, even when the basis for the decision is ambiguous, as long as the award draws its essence from the bargaining agreement." 807 F.2d at 500, citing *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598-99 (1960). And in *Misco* this Court held: "The Courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." 56 U.S.L.W. at 4013. Even where an appellate court is convinced that the arbitrator committed "serious error", this error in the absence of "fraud" or the "arbitrator's dishonesty" does not suffice to overturn the arbitrator's decision, "as long as the arbitrator is even arguably construing or applying the [collective bargaining] contract . . ." 56 U.S.L.W. at 4014.

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CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DATED THIS 18th day of January, 1988.

Respectfully submitted,

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